Supreme Court, U.S.
FILED
JUL 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2039

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,
Petitioner,

v.

FRIEDA JOYCE JOHNSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HORTON JOHNSON, DECEASED,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JOEL D. EATON, ESQUIRE
(Counsel of Record)
PODHURST, ORSECK, PARKS, JOSEFSBERG, EATON, MEADOW & OLIN, P.A.
Suite 800, City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800
Attorneys for Respondent

BARWICK & DILLIAN, P.A.
9636 N.E. 2nd Avenue
Miami Shores, Florida 33138
Of Counsel

E. L. MERSEREAU, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

15pp

QUESTION PRESENTED FOR REVIEW

In framing the question presented for review here, the Government asserts that Mr. Johnson was killed "during a military mission" by the negligence of an air traffic controller who "participated in the military mission". Those are not exactly the facts in this case. The Eleventh Circuit's opinions carefully explain that Mr. Johnson was killed while searching for a civilian boat in distress by the negligence of a civilian controller providing routine air traffic control service. We therefore feel constrained to restate the question presented here neutrally, as follows:

Whether the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), bars a wrongful death action brought under the Federal Tort Claims Act on behalf of the survivors of a military serviceman killed by the negligence of a civilian employee of the Federal Aviation Administration, a civilian agency of the Government.

TABLE OF CONTENTS

REASONS WHY THE PETITION SHOULD BE DENIED 1

TABLE OF AUTHORITIES

Cases

Brooks v. United States, 337 U.S. 49 (1949) 6
Chappell v. Wallace, 462 U.S. 296 (1983) 3
Cole v. United States, 755 F.2d 873 (11th Cir. 1985) 7
Daley v. United States, ... F.2d ..... (11th Cir. 1986) (case no 85-3445; slip opinion filed July 3, 1986) 9
Feres v. United States, 340 U.S. 135 (1950) .....*passim*
Hatzlachh Supply Co. v. United States, 444 U.S. 460 (1980) 6
Hunt v. United States, 636 F.2d 580 (D.C. Cir. 1980) 3
Johnson v. United States, 749 F.2d 1530 (11th Cir. 1985), *approved on reh'g en banc*, 779 F.2d 1492 (11th Cir. 1986) 4
Johnson v. United States, 779 F.2d 1492 (11th Cir. 1986) (en banc) 6
Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983) 6
Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) 7
Stanley v. United States, 786 F.2d 1490 (11th Cir. 1986) 7
United States v. Brown, 348 U.S. 110 (1954) 3, 6
United States v. Muniz, 374 U.S. 150 (1963) 3
United States v. Shearer, 473 U.S. ....., 105 S. Ct. 3039, 87 L. Ed.2d 38 (1985) 2, 4, 5, 6, 7, 10

Statutes

49 U.S.C. §1348(c) 8
49 U.S.C. §1348(f) 8

No. 85-2039

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,

Petitioner,

v.

FRIEDA JOYCE JOHNSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HORTON JOHNSON, DECEASED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Frieda Joyce Johnson, individually and as administratrix of the estate of Horton Johnson, deceased, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's en banc decision in this case.

REASONS WHY THE PETITION SHOULD BE DENIED

We cannot deny that there is a conflict among the circuits concerning the applicability of the *Feres* doctrine to cases like this one. The conflict is clearly stale, how-

ever, and has been effectively resolved by this Court's recent decision in *United States v. Shearer*, 473 U.S. ....., 105 S. Ct. 3039, 87 L. Ed.2d 38 (1985). That was the conclusion of the 8-4 majority of the en banc Court below, of course—and we are frankly puzzled by the Government's failure to confront the plain language of *Shearer*, upon which the majority squarely relied below, anywhere in the text of its petition for certiorari. Perhaps there was simply no rejoinder available to the Government except to reargue the outdated interpretation of *Feres* now clearly rejected by *Shearer*.

At issue here is the outer boundary of the reach of the much-maligned *Feres* doctrine, an issue which has a long and tortured history in this Court and the lower courts. That history has been carefully traced in the thoughtful opinion filed by the panel (and adopted by the majority), below, so we will not belabor it. Instead, in the interest of brevity, we will reduce it to its barest essentials. The history begins when this Court initially articulated several "rationales" for its creation of the *Feres* doctrine. Because some of those reasons (like the "distinctively federal character of the relationship", and the availability of VA benefits) existed in every suit brought by a serviceman against the Government under the Federal Tort Claims Act, lower courts began applying a "bright line rule"—erecting the *Feres* bar automatically whenever the plaintiff occupied the "status" of "active duty serviceman". It is these earlier, purely "status-related" decisions upon which the Government relies for conflict here.

When applied, of course, the *Feres* doctrine is (in effect) a license for tortious conduct and a mandate of second-class citizenship for servicemen. It therefore did not sit lightly with the lower courts or the commentators.

Neither did this Court treat it lightly, and over the course of the years that followed, it refined the foundations of the doctrine, announcing that the doctrine "seems best explained" by only one of the initially articulated rationales—what has now become known as the "military discipline rationale". *United States v. Brown*, 348 U.S. 110, 112 (1954); *United States v. Muniz*, 374 U.S. 150, 162 (1963); *Chappell v. Wallace*, 462 U.S. 296, 299 (1983).

With that lead, the lower courts began looking beyond the purely "status-related" test of the earlier decisions to the reasons underlying the *Feres* doctrine, and (as the panel's opinion explains in detail) began declining to erect the *Feres* bar when the primary rationale which "serves largely if not exclusively as the predicate for the *Feres* doctrine" was not implicated by the facts of the particular case. *Hunt v. United States*, 636 F.2d 580, 599 (D.C. Cir. 1980). This, in our judgment, was perfectly defensible—since a judicially created exception to an Act of Congress, amounting to a license for tortious conduct and a mandate of second-class citizenship, should clearly be applied sparingly, only when necessary, only when its legitimate purpose and primary reason are served. It was against this historical background that the issue presented here was presented to the Eleventh Circuit below.

After a thorough and thoughtful analysis of the problem, the panel concluded that the primary reason for the *Feres* doctrine was its "military discipline rationale"; that the remaining rationales initially advanced in support of the doctrine had not survived the scrutiny of time, and by themselves provided insufficient reasons for imposition of the *Feres* bar; that the plaintiff's suit did not implicate the primary rationale of the doctrine; and that the plaintiff should therefore not be deprived by the judiciary of the remedy expressly given her by Congress:

> With these principles in mind, we have little difficulty concluding that the *Feres* doctrine does not bar plaintiff's FTCA suit. The complaint in this case alleges that plaintiff's decedent was killed because civilian FAA air traffic controllers negligently guided the helicopter he was piloting into a mountain. There is absolutely no hint in the scant record before this court that the conduct of any alleged tortfeasor even remotely connected to the military will be scrutinized if this case proceeds to trial. Nor is there a suggestion that examining the conduct of a civilian would in any way implicate the military services. Since the prosecution of plaintiff's claim cannot conceivably involve or compromise a military relationship or, for that matter, the military disciplinary structure, the prosecution of plaintiff's claim will not encroach upon the rationale which "serves largely if not exclusively as the predicate for the *Feres* doctrine." *Hunt*, 636 F.2d at 599. We therefore are unable to discern any sound reason for barring plaintiff's suit under the *Feres* doctrine.

Johnson v. United States, 749 F.2d 1530, 1539 (11th Cir. 1985), *approved on reh'g en banc*, 779 F.2d 1492 (11th Cir. 1986). The concluding footnote of the panel's opinion observes that "the Supreme Court recently accepted an invitation to revisit the *Feres* doctrine. *See Shearer v. United States*, 723 F.2d 1102 (3d Cir. 1983), *cert. granted*, ... U.S. ....., 105 S. Ct. 321, 83 L. Ed.2d 259 (1984)". 749 F.2d at 1540 n.13.

In our judgment, the panel's analysis of the scope of the *Feres* doctrine was fully vindicated by this Court's subsequent decision in *Shearer*. In that case, this Court reiterated that "*Feres* seems best explained" by the mil-

itary discipline rationale, and it observed that the other rationales advanced in the past as support for the *Feres* doctrine were "no longer controlling". *Shearer,* 87 L. Ed.2d at 44, 44 n.4. It also squarely rejected the position advanced by the Government here—that application of the *Feres* bar depends exclusively upon the "status" of the plaintiff as active-duty serviceman, rather than the extent to which the facts implicate the reason for the doctrine—noting that "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules" . . . and that the *Feres* bar should be erected only when "the suit requires the civilian court to second-guess military decisions . . . and . . . the suit might impair essential military discipline". *Id.* We cannot read this Court's mind, of course, but we think it not improbable that the *Shearer* opinion was drafted with the instant case clearly in mind. At the very least, *Shearer* implicitly approves everything said in the panel's opinion in this case.

In any event, that is the way the 8-4 majority of the en banc Court read *Shearer* below:

> Following this command [of *Shearer*], we find that the panel opinion has given proper consideration to the *Feres* factors with particular attention to whether or not the claims asserted here will implicate civilian courts in conflicts involving the military structure or military decisions. The claims presented are based solely upon the conduct of civilian employees of the Federal Aviation Administration (a civilian administration within the Department of Transportation) who were not in any way involved in military activities. The fact that the decedent was a helicopter pilot for the United States Coast Guard is not sufficient, standing alone, to activate the *Feres* preclusion.

Johnson v. United States, 779 F.2d 1492, 1494 (11th Cir. 1986) (en banc). If *Shearer* is still the law in this Court, the instant case was clearly decided correctly—and there is no need for this Court to grant certiorari simply to reannounce what it has already announced in *Shearer*. The conflicts have been effectively resolved by *Shearer*, and will therefore take care of themselves. At the very least, the issue presented here deserves further exploration by the lower courts in light of *Shearer*, so that this Court has the benefit of a thorough analysis of the issue upon its new foundation before resolving it with finality.

In addition to asserting conflict with the now thoroughly discredited, purely "status-related" progeny of *Feres*, the Government argues that this case was decided incorrectly because Mrs. Johnson received limited VA benefits (a fact which is not in the record), and because trial of the case *will* impact the "military discipline rationale" of *Feres*. In view of the fact that this Court announced in *Shearer* that the "VA benefits rationale" of *Feres* is "no longer controlling", our response to the first argument can be exceedingly brief. We note simply that this Court has never held that the receipt of VA benefits, by itself, is sufficient to activate the *Feres* bar, and it has refused to erect the bar where VA benefits were received but the other factors of *Feres* were absent—holding instead simply that benefits received were to be offset against a recovery in the FTCA action. *Brooks v. United States*, 337 U.S. 49 (1949); *United States v. Brown*, 348 U.S. 110 (1954). *See Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983).

There is a dictum (and it is indisputably a dictum) in *Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980), to the effect that VA benefits are the "exclu-

sive" and "sole remedy" available to servicemen, but the lower courts have consistently read this dictum to mean that receipt of VA benefits becomes a serviceman's "sole remedy" only *because* (and when) the *Feres* doctrine otherwise bars an FTCA action, not that an FTCA action is barred *because of* the receipt of VA benefits. *See, e.g., Cole v. United States,* 755 F.2d 873 (11th Cir. 1985); *Stanley v. United States,* 786 F.2d 1490 (11th Cir. 1986); *Parker v. United States,* 611 F.2d 1007 (5th Cir. 1980). After *Shearer,* of course, there can no longer be any doubt as to the correctness of this reading of the *Hatzlachh* dictum—and, once again, there is simply no need for this Court to grant certiorari in this case to reannounce what it just announced in *Shearer.*

The Government has also insisted that the instant case was wrongly decided because the facts squarely implicate the "military discipline rationale" of *Feres.* The 8-4 majority of the Court below expressly found to the contrary, of course—and not even the dissenting judges (who relied exclusively on the now discredited "status-related" progeny of *Feres*) concluded to the contrary. Although this 12-0 vote on this argument should probably be dispositive of its propriety here, we feel constrained to respond to it briefly because the facts upon which it depends have simply been invented from whole cloth.

The very most that the record in this case presently reflects is that Mr. Johnson requested routine air traffic control service, by radio request to a conventional Air Route Traffic Control Center, when his helicopter encountered instrument flight conditions, as any pilot—civilian, military, foreign, or otherwise—was required to do by federal regulation. No contention has been made that the Coast Guard was negligent in launching the

rescue mission at issue in this case, or negligent in any other way. Neither has any contention been made that the weather conditions were so bad that non-military air traffic could not operate in them. Neither has any contention been made that Mr. Johnson's mission was any more dangerous than flight under instrument conditions by a civilian aircraft. Neither has any contention been made that Mr. Johnson was involved in any of the types of "Special Military Operations" described in the Department of Transportation manual which the Government has added to the record here.

Neither has the Government alleged contributory negligence on the part of Mr. Johnson at this stage of the proceedings. But even assuming that this issue might ultimately surface in the litigation, there will still be only two very narrow factual issues to be decided—whether, after the plaintiff's decedent submitted his helicopter to the positive control of the Government's air traffic controllers, appropriate directions concerning altitude and heading were given to him, and whether he piloted his helicopter properly in light of those directions. Those questions will not implicate anything even remotely "military"—and their answers will depend solely upon federal air traffic control regulations promulgated by the FAA, which apply equally to civilian and military aircraft alike.[1]

---

1. 49 U.S.C. §1348(c) directs the Secretary of Transportation "to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, . . . and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision . . .". 49 U.S.C. §1348(f) makes it perfectly clear that all military aircraft are required to comply with the regulations directed by subsection (c), except in the following narrow circumstances:

(Continued on following page)

In short, the litigation of this case will be no different in any respect than it would have been if the plaintiff's decedent had been employed by United Airlines.

Suits by the survivors of commercial airline pilots against the FAA for the negligence of air traffic controllers have never been barred by the *Feres* doctrine, notwithstanding the clearly symbiotic relationship of the FAA and the commercial airline industry, because a suit against the Government for the negligence of the FAA does not charge anyone in the military with misfeasance; it does not bring the actions of military servicemen under judicial scrutiny; and it poses no threat to the military disciplinary structure whatsoever. *See, e.g., Daley v. United States,* ..... F.2d ..... (11th Cir. 1986) (case no. 85-3445; slip opinion filed July 3, 1986). If an FTCA action is not inappropriate in that circumstance, it is not inappropriate in this case merely because Mr. Johnson happened to be wearing a uniform when he requested routine civilian air traffic control service. The instant case is no different than the case in which a serviceman

---

Footnote continued—

> When it is essential to the defense of the United States because of a military emergency or urgent military necessity, and when appropriate military authority so determines, and when prior notice thereof is given to the Secretary of Transportation, such military authority may authorize deviation by military aircraft of the national defense forces of the United States from air traffic rules issued pursuant to this subchapter. Such prior notice shall be given to the Secretary of Transportation at the earliest time practicable and, to the extent time and circumstances permit, every reasonable effort shall be made to consult fully with the Secretary of Transportation and to arrange in advance for the required deviation from the rules on a mutually acceptable basis.

We assure the Court that this exception will never be implicated on the facts in the instant case, and that this is a straightforward case governed by air traffic rules promulgated by the FAA which apply equally to all pilots operating in the national air space.

is struck by an errant bullet negligently fired by an FBI agent into the crowd at an Army-Navy game, or the case in which a serviceman is run over by a truck operated by a lawyer employed by the Department of Justice. The *reason* for the *Feres* doctrine is simply not implicated here, so the *Feres* doctrine is not implicated either.

Unless this Court is anxious to recede from *Shearer* before its ink has scarcely dried, or to license the tortious conduct of civilian employees of the Government and mandate second-class citizenship for servicemen *merely* because they are servicemen, we respectfully submit that the Eleventh Circuit appropriately heeded this Court's unmistakably clear signal in *Shearer;* that its thorough en banc analysis of this case resulted in a correct conclusion; and that the petition for writ of certiorari should be denied.

Respectfully submitted,

JOEL D. EATON, ESQUIRE
(Counsel of Record)
PODHURST, ORSECK, PARKS, JOSEFSBERG,
EATON, MEADOW & OLIN, P.A.
Suite 800, City National Bank
Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800
Attorneys for Respondent

BARWICK & DILLIAN, P.A.
9636 N.E. 2nd Avenue
Miami Shores, Florida 33138
Of Counsel